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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 40

JOHN W. STANFORD, JR.,
Petitioner

VS.

STATE OF TEXAS,
Respondent

ON WRIT OF CERTIORARI TO THE 57TH JUDICIAL DISTRICT COURT OF BEXAR COUNTY, TEXAS

SUPPLEMENTAL BRIEF FOR RESPONDENT

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IN THE

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JOHN W. STANFORD, JR.,

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STATE OF TEXAS,

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MOTION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner filed his Reply Brief with this Court on the morning of argument, and a copy was received by this counsel on November 11, 1964, in Washington, D. C. Opportunity has not been afforded the State of Texas to answer some of the matters presented therein because of the limited time of receipt prior to argument. Respondent desires also to answer more completely some of the questions raised during argument which appeared to be of concern to some of the members of this Court.

Respondent, for the reasons above stated and with the hope of being of some assistance to this honorable Court, respectfully requests permission to file the attached supplemental brief.

SUPPLEMENTAL BRIEF

I. THE TEXAS SEDITION STATUTES ARE NOT SO VAGUE AS TO PROHIBIT RATIONAL APPLICATION

A. "The Communist Control Law"

The Texas Communist Control Law, Article 6889-3, Texas Civil Statutes, is principally a registration law requiring the registration of everyone in the State who is a Communist. Failure to register is punishable as a felony. This statute defines the word "Communist" in four separate definitions, briefly stated for convenience as follows:

> A "Communist" is a person (a) who "is a member of the Communist Party, notwithstanding the fact that he may not pay dues to, or hold a card in, said Party" (b) who "knowingly contributes funds or any character of property to the Communist Party"; or who "commits or advocates the commission of any act reasonably calculated to further the overthrow of the Government of the United States of America, the Government of the State of Texas, or the government of any political subdivision of either of them" (c) "by force or violence" or (d) "by unlawful or unconstitutional means."

1. Petitioner attacks definition (a) because it seeks to require the registration of nominal members of the Party, and imposes criminal sanction upon a failure to register and does not require a knowing and active membership as prescribed by the Court in *Dennis v. United States*, 341 U.S. 494 (1951). The simple answer to this contention of the Petitioner is that the United States statute as construed in *Dennis v. United States*, supra, does not specify a knowing and active mem-

bership, although the Court held that for such a statute to be constitutional, proof of these elements must be adduced. In any event, the Texas statute as worded meets the constitutional tests imposed by the Court and questions of constitutionality will be reached only during a trial where the charge is the failure to register and after the State of Texas has produced its evidence to show that the accused is a "Communist."

2. Under definition (b), the State of Texas would have to refer to the section of the law which defines the Communist Party as "any organization which is substantially directed, dominated or controlled by the Union of Soviet Socialist Republics or its satellites, or which in any manner advocates, or acts to further, the world Communist movement." It is conceded that there is a serious evidentiary question raised in proving the existence of other nations as satellites of the Union of Soviet Socialist Republics. Should the State of Texas be able to prove at a trial that the Texas Communist Party is directly dominated or controlled by the Union of Soviet Socialist Republics, that the accused knew of such domination and control and that to further the world communist movement and the cause of the Texas Communist Party, the accused knowingly was active therein or contributed money or property thereto, it would seem that this quantum of proof would satisfy the requirements as laid down by this Court in defining an active, knowing membership in the Communist Party. The problem in applying the definition does not seem to be a constitutional one of vagueness, but rather an evidentiary one.

3. Under definition (c), the language complained of by Petitioner as stated in his reply brief is "reason-

ably calculated to further the overthrow," the Petitioner contending that this language is too broad.

Initially, it should be observed that this definition is remarkably like the language in Section 2385, Title 18, U.S.C., which has been construed in great detail by this Court.

It is next noted that the commission or advocacy of the act "reasonably calculated to further the overthrow of the Government" by force or violence is almost identically the proof requirement imposed by *Yates v. United States*, 354 U.S. 298 (1951). The Court cites with approval the charge in *Dennis v. United States*, supra, the Court saying, at page 326, that the *Dennis* conviction "bottomed" on the charge, with the opinion setting out this charge as follows:

> "In further construction and interpretation of the statute (the Smith Act) I charge you that it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by this law, but the teaching and *advocacy of action* for the accomplishment of that purpose, by language *reasonably and ordinarily calculated to incite persons to such action*. . . ." (Emphasis supplied.)

It is urged that Texas statute merely recites an element of necessary proof before the conviction of a Communist can meet the tests of constitutionality as imposed by this Court. If the words "reasonably calculated" are understandable to a jury called upon to make a decision in a criminal case, the alleged vice of vagueness is defeated. See also *Wellman v. United States*, 253 F2d 601 (1958).

4. Petitioner complains that definition (d) is vague for the same reasons given in his attack on definition (c), and that the definition is aggravated by "substituting 'unlawful or unconstitutional means' for 'by force and violence.'"

Respondent submits that "unlawful or unconstitutional means" of necessity must be synonymous with the words "by force and violence" inasmuch as only an overthrow by force or violence can be punished constitutionally by either the United States or one of the several states. The crime alleged in *United States v. Foster, et al*, 9 F.R.D. 367 (1949), was conspiracy to organize the Communist Party in violation of Section 2385, Title 18, U.S.C. In this charge at page 391, Judge Medina in effect instructed the jury that what was prohibited under the act was "the teaching and advocacy of action for the accomplishment of that purpose [overthrowing, or destroying organized government by *unlawful means*], by language reasonably and ordinarily calculated to incite persons to such action." (Emphasis supplied.)

B. "Communist Party Suppression Law"

This act, Article 6889-3A, outlaws the Communist Party in Texas and punishes attempts at, or advocation of, the overthrow of the government of Texas by force or violence. Petitioner characterizes this law as modeled after the United States Communist Control Act of 1954, 50 U.S.C. Section 842. This is partially incorrect. Article 6889-3A forbids the same and similar acts as are forbidden by the Smith Act, 18 U.S.C., Section 2385, which prohibits advocacy of the overthrow of the United States by force or violence and organiza-

tion of and membership in any group which has such overthrow as its aim and purpose. It is Article 6889-3, the act discussed immediately above and denominated the Texas Communist Control Law, which requires registration of Communists that more nearly resembles the United States Communist Control Act of 1954.

In any event, Petitioner attacks the Suppression Law, which forbids advocacy or an attempt to overthrow the government by force or violence, by characterizing as vague, this language from Section 2 (outlawing the Communist Party):

> "all other organizations . . . which . . . advocate, abet, advise, or teach, or a purpose of which is to . . advocate, abet, advise, or teach any activities intended to . . . alter . . . the constitutional form of government [of the United States or Texas] by force or violence."

In the first place, this type of language was approved in *Dunn v. United States*, 138 F2d 137 (1943), cert. den. 320 U.S. 790, reh. den., 320 U.S. 815, the Court approving a Federal penal statute punishing advocacy of insubordination in the armed forces and saying that the words "advocate, abet, advise, or teach the duty, necessity, desirability or propriety" (of insubordination in the armed forces) are ordinary everyday terms with generally understood meanings.

While the language of Section 2 of Article 6889-3A has no constitutional vice, the language in any event has no application to the unlawful acts as defined in the statute and a recitation of the language of Section 2 only serves to confuse the true constitutional questions in the Suppression Act. The illegal acts are defined in Section 5 which has no reference to the cited

language and the unlawful acts defined therein are the almost identical acts denounced by 18 U.S.C. Section 2385. Petitioner does not in his brief attack Section 5 as being vague or indefinite. See this Court's discussion of vagueness as applied to Section 2385, Title 18, in *Dennis v. United States*, supra, at page 515 of the opinion.

II. THE TEXAS SEDITION STATUTES ARE CONSTITUTIONAL.

A. Preemption

The determination of the question of constitutionality of State statutes in the field of sedition is of extreme importance to the jurisprudence of the United States and to each of the several states. If these statutes are unconstitutional, the search warrant issued in this case is void and this Court must sustain petitioner's contention. The State of Texas, of course, does not agree with the position taken by petitioner.

Certainly this Court will grant the premise that a government is not forcibly overthrown by a single act. Water dripping on a stone eventually wears it away; can we say which drop caused the destruction? One drop alone causes no appreciable damage; it is the combined effect which achieves the result.

The opinion of this Court in *Dennis v. United States*, supra, at page 509, recognized this fact. It was pointed out that for acts to be a clear and present danger, it was not necessary for the government to wait for a putsch:

> "Certainly an attempt to overthrow the government by force, even though doomed from the outset because of inadequate numbers or power of

> the revolutionists, is a sufficient evil for Congress to prevent. The damage which such an attempt creates both physically and politically to a nation makes it impossible to measure the validity in terms of probability success . . ."

Acts and conduct designed to overthrow a government taken individually may have no appreciable effect. However, when they became part of an organized pattern, however insignificant of themselves, they became a present danger. The illegal pattern of the Communist Party as an organization advocating the overthrow of the government by force and violence, has been previously recognized by this Court in the cases of *The Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961), *Scales v. United States*, 367 U.S. 203 (1961), and others. In the case of *Gibson v. Florida Legislative Commission*, 372 U.S. 539 (1963), Mr. Justice Goldberg stated at page 547:

> ". . . the Communist Party is not an ordinary or legitimate political party, as known in this country, and that, because of its particular nature, membership therein is itself a permissible subject of regulation and legislative scrutiny."[1]

Historically, the physical protection of the individual within the community from crime and violence has been the duty of the State and the Community even to the extent that the assassin of a president would be punished under State rather than national law. On the other hand, the federal government has offered protec-

[1] Petitioner himself on page 26 of his brief, admits that the activities of the Communist Party are directed primarily against the federal government and again on page 29. Petitioner admits that the fortunes of the Communist Party are closely tied to a foreign nation which is antagonistic to the United States.

tion from invasion or insurrection and in the broad field of constitutional rights and liberties.

With this background in mind, let us examine the question of whether or not the State has a right to pass laws prohibiting acts which constitute an attempt to overthrow the government of a State or its political subdivisions in the course of which attempt the health, life and safety of its citizens will be placed in jeopardy, or, whether the federal government preempted the right of the State to act in this field.

Summarizing the result reached by this Court in the case of *Head v. New Mexico Board of Examiners*, 374 U.S. 424 (1963), we conclude that a court may find that congress has preempted the states in a field of legislation if the facts of each individual case show that congress has exercised its jurisdiction in a manner to exclude the State because either the subject requires national uniformity, or because there is a conflict in the two schemes of regulation. Likewise, a Court may find that preemption exists if there is evidence of the intent of Congress to occupy the field exclusively.

Is there any conflict in the historic duty of the State to protect the person and property of the individual and the obligation of the federal government to protect itself against the plot of any group to forcibly overthrow it? We can see none. This Court recognized in *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497 (1956), that Congress had preempted the state statutes in the field of sedition as it related to the national activities of any group or organization. In other words, attempts to overthrow the National government would consist of activities crossing many state lines and could

only logically be handled by the federal government under the same reasoning that vested control of interstate commerce in Congress rather than in the legislatures of the respective states. Even in the field of interstate commerce, the traditional concept of the police power of the State has been recognized. In the case of *Head v. New Mexico Board of Examiners*, supra, this Court quoted at page 428 from an earlier case of *Huron Portland Cement Company v. City of Detroit*, 362 U.S. 440 (1960), stating that:

> "... Congress ... never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though legislation might indirectly affect the commerce of the country."

If the Communist Party ultimately plans to overthrow the government of the United States by force and violence, in what way can laws of the State which attempt to regulate communists be upheld against the charge that Congress had preempted this field and that all State laws on the subject are invalid? Let us go back to the initial premise that a single act taken alone does not cause a government to fall but it must be one of many. Although this theoretical act may be part of an overall scheme, the State has the duty, the obligation and the right to protect the individual from direct consequences of acts of violence. To illustrate: A Communist instructs or incites a group to riot, to destroy public or private property, to injure other individuals and to create and encourage a disregard for law and for local government. In any such riot or mob action there is a *temporary* overthrow of local government, at least to a limited degree. The teaching of the local

group how to incite others to riot or directly inciting riot, causes an immediate danger to the person or property of the individual located in that particular city, which the State must enact laws to protect. To deny the State this right is to deprive them of one of the very basic reasons for their continued existence. To say that Congress meant to assume this burden in its entirety cannot be supported. To protect against the individual attempting violent overthrow, a vast number of new laws would have to be enacted by Congress. In Austin, Texas, for example there are over 250 policemen plus 15 to 20 deputy sheriffs to afford police protection to the individual. At present, there are only four FBI agents in this city. Certainly, a plot to overthrow the government of the City of Austin, even if part of a larger plot to ultimately overthrow the government of all principal cities and of the United States, would have to be suppressed by local law enforcement officers, unless Congress increased the FBI to fifty times its present strength, or, stationed Army units in every city.

Would not also the State have the right by enforcing sedition laws to protect itself against a plot to overthrow our state institutions by intimidating legislators or placing them in fear of their life or assassinating public officials? Recently the Attorney General of Texas received a copy of a letter, the original of which was sent to the Governor of the State of Virginia. In this letter the writer (purporting to be the president of an organization) stated that unless the State of Virginia disregarded the decisions of the United States Supreme Court and effected laws which would protect the individual against the acts of this Court, that it

would probably again be necessary for the people to take up arms in protection of their liberties. We forwarded the letter to the FBI for certainly it was designed as an attempt to create disrespect for this Court as an essential part of our federal government. It was also used to threaten and intimidate the legislators of the State of Virginia by requiring the State of Virginia to either defy the authority of the federal government or suffer the possibility of an attempt to overthrow its government.

We believe that this Court has clearly recognized that Congress did not intend to preempt all legislation in the field of sedition to the exclusion of the states in areas affecting the overthrow of the state government. In the case of *Uphaus v. Wyman*, 360 U.S. 72 (1959), and in *Gibson v. Florida Board of Control*, supra, this Court recognized that membership itself in the Communist Party was a permissible subject to regulation and legislative scrutiny. In the *Uphaus* case, this Court said at page 76.

> "... a state could proceed with prosecutions for sedition against the state itself ... the state had full power to deal with internal civil disturbances. Thus registration statutes, quo warranto proceedings as to subversive corporations, the subversive instigation of riots, and a host of other subjects directly affecting state security, furnish grist for the state's legislative mill."

B. Sedition Statutes do not Violate First Amendment

Petitioner has also contended that the Texas sedition statutes violate the First Amendment to our United States Constitution. We likewise think that this argument is without merit. In the case of *Roth v. U.S.*, 354

U.S. 476 (1957), this Court held that libel, blasphemy, profanity, and obscenity are not protected by the First and Fourteenth Amendments. In fact the First Amendment was not intended to protect every utterance. In the case of *Beuharnais v. Illinois*, 343 U.S. 250 (1952), this Court held that libel was not protected. In the case of *Gibson v. Florida Legislative Council*, supra, this Court, speaking through Justice Goldberg, stated that the government interest in controlling subversives and the particular character of the Communist Party and its objectives, outweigh the right of the individual Communist to conceal party membership. Again, in the case of *American Communications Association v. Douds*, 339 U.S. 382 (1950), it was held that an oath required to be signed by union leaders was not an abridgement of freedom of speech, but was aimed at particular acts or conduct. The Court continued that the important question was not whether, but how far, the First Amendment permits suppression of speech which also advocates conduct inimical to public welfare. There is no constitutional inhibition to regulate conduct. The Court cited as examples, regulation against a blaring sound truck, unauthorized parades, acts affecting health, morals, character or members of a bar association, are all subject to regulations. The Court quoted Chief Justice Hughes in the case of *Cox v. New Hampshire*, 312 U.S. 569 (1941), wherein it was stated at page 574:

> "Civil liberties as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

The Court then said that a non-communist oath or registration is designed to protect the public not against

what Communists advocated or believed, but against what Congress has concluded that they have done and are likely to do again. The necessity for a law in a particular field is a function of Congress, and a Court cannot substitute its judgment for that of Congress as to the necessity for regulation.

III. THE SEARCH WARRANT WAS LEGALLY ISSUED AND SOUND

A. Probable Cause

1. *Sources of Information.* From information received from confidential informants known to be reliable, the State of Texas learned that Petitioner herein, John W. Stanford, Jr., was an official in the Communist Party of Texas, that he distributed literature espousing the Communist line, that the literature and books were used by him as instruments to advocate the then Communist line, and to forward the aims and purposes of the Communist Party (R. 56, 58, 61). From these confidential sources, it was learned that Stanford was engaged in promoting the Communist Party line whose ultimate purpose was the overthrow of the government of Texas by force and violence, that Stanford knew of the violent purpose of the Party and he was an active member thereof.

2. *Use as an "Instrumentality."* It was reported that identical literature of the kind seized under the search warrant was distributed by Stanford and represented by him that certain parts of publications and material reflected the Communist Party thinking. It was further represented that the literature was being used to prepare the minds of the citizenry so that when

the time came for violence and active overthrow, the populace would be sympathetic to these aims or else so conditioned by this literature that they would be apathetic to a Communist takeover. These pieces of literature then were tools, instrumentalities or instruments of crime because they were being used as a part of a plan designed to assist the ultimate violent overthrow of the government. Unlike pornography the books and material were not of themselves contraband. They are "instrumentalities" in the manner used, even though other copies in other hands would not be subject to seizure. Whether or not they would ever, in the manner used, accomplish the intended purpose is not in itself important. *Dennis v. U. S.*, supra.

In *Scales v. United States*, supra, this Court held that the introduction into evidence of two tracts, "Black Belt," maintaining that the Negro population in the South has the right to form a new nation, and "I Saw the Truth in Korea," detailing alleged gruesome American atrocities in Korea, were properly admissible in evidence. With regard to the pamphlet "Black Belt" this Court said at page 256 that "the preaching that the Negro population in the South has the right to form a separate nation does not of itself constitute illegal advocacy. But neither does the teaching of the abstract theory of Marxism-Leninism . . ." The Court further said that "I Saw the Truth in Korea" "may not in itself constitute such an incitement to violence as would justify a finding that the Party advocated violent overthrow, but it is possible to infer from it that it was the purpose of the Party to undermine the government in the eyes of the people . . . as a preparatory measure, albeit legal in itself, to the teaching

and sympathetic reception of illegal advocacy to violent revolution."

The above named pamphlets were a part of the tools and instruments used in perpetrating the crime of advocating or committing the overthrow of the government by force or violence. If these pamphlets were properly evidentiary, they can only be instruments used in the commission of the crime charged—"illegal advocacy to violent revolt." While the possession, reading and teaching from the "Black Belt" and "I Saw the Truth in Korea" may be within the protection of the 1st Amendment, their use as a part of a plan to overthrow the government by force and violence is not so protected. It is the manner of their use, not necessarily their content, that takes the pamphlets from without the protection of the Constitution and makes them evidence of the crime of "illegal advocacy to violent revolt" as instrumentalities used in its perpetration. Should an opinion of this Court which might be unpopular with some groups be reprinted and used as a tool to incite that group to riot, the copies so used would be subject to seizure under the laws of the United States and under the laws of Texas, but the Opinion itself, certainly would not be suppressed.

3. *Sufficiency of Description of Items Seized.* It is interesting to note that the boundaries of search and seizure are broader under the Federal laws then they are under the laws of Texas. Rule 41 of the Federal Rules of Criminal Procedure, authorizing searches and seizures provides in part as follows:

> "(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, common-

wealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

"(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

"(1) Stolen or embezzled in violation of the laws of the United States; or

"(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

"(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, § 957."

This rule provides that property "*intended for use* or property which is *used* as a means of committing a criminal offensive is seizable, and Subsection 3 of Section (b) of the Rule permits the seizure of property intended for use in violation of Section 957 of Title 18, U.S.C. which provides as follows:

"Whoever, in aid of any foreign government, knowingly and willfully possesses or controls any property or papers used or designed or intended for use in violating any penal statute, or any of the rights or obligations of the United States under any treaty or the law of nations, shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

The above cited criminal law specifically provides that *papers* used in violating any penal statute in aid of a foreign government is a crime, and such papers may be searched for and seized pursuant to Rule 41.

4. *Constitutionality of Section 9.* Section 9 of Article 6889-3A must be read in connection with Title

6 of the Texas Code of Criminal Procedure to which reference is therein made. These statutes taken together reflect that only such evidence that may be an "instrumentality of crime" can be seized.

Although petitioner has picked out one or two isolated items which were lost amid the general contents of the file cabinet seized and were certainly not "instrumentalities" or even evidence of crime, this should not invalidate the use of the myriad of documents that actually were "instrumentalities."

It is submitted that if the State's theory is correct, and if Petitioner is later indicted and tried, the books and pamphlets seized from the home would be properly admissible in evidence as instrumentalities used by Stanford to persuade the members of the Texas community toward an acceptance of the Communist Party doctrines and philosophies so that the population would either be active in accomplishing violent takeover, or be sympathetic to those so engaged. The admissibility of this evidence would depend on first establishing the manner of their use by competent witnesses at the time it was offered at a trial.

CONCLUSION

The State of Texas submits that the Texas Communist Statutes are constitutional. They are neither so vague nor so broad as to prohibit rational administration of their penal provisions, nor has the subject matter, as covered in the Texas statutes, been preempted by Federal legislation.

In issuing the search warrant in this case, the State of Texas acted to seize instrumentalities used in com-

mitting crimes as defined by the Texas Communist Statutes, a valid, constitutional exercise of its sovereign powers to inhibit and control activities dangerous to the orderly, governmental functions of a democratic state.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief for Respondent were served upon Maury Maverick, Jr., Maverick Building, San Antonio 5, Texas, John J. McAvoy, 14 Wall Street, New York 5, New York, and Melvin L. Wulf, 156 Fifth Avenue, New York 10, New York, Attorneys for Petitioner, by depositing same in the United States mail, properly addressed, postage paid, certified mail, on this the _____ day of _____, 1964.

HAWTHORNE PHILLIPS
Of Counsel